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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-829

GLENN L. MORGAN,

Petitioner,

versus

STATE OF LOUISIANA EX REL, GUY WOOTAN CUSTODIAN OF NOTARIAL RECORDS,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

William J. Guste, Jr.
Attorney General
State of Louisiana

Warren E. Mouledoux
First Assistant Attorney General

Robert E. Redmann
Assistant Attorney General
State of Louisiana
7th Floor, 234 Loyola Avenue
New Orleans, Louisiana 70112
Telephone: (504) 527-8371

Attorneys for the
State of Louisiana

Phillip A. Wittmann
Walter B. Stuart IV
Of
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
1000 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone: (504) 581-3200

Ronald P. Whittington
WOOTAN, HOWCOTT AND WHITTINGTON
1649 First National Bank of Commerce Building
New Orleans, Louisiana 70112
Telephone: (504) 586-1996

Attorneys for Respondent,
Guy Wootan, Custodian of
Notarial Records

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

QUESTION PRESENTED

Are certain provisions of the Louisiana statutes requiring notaries public in Orleans Parish to post a ten thousand dollar bond, to provide yearly evidence of the solvency of the sureties on the bond, and to pay an annual fee, none of which is required of sureties in other parishes of the state, violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States?

STATEMENT OF THE CASE

On April 22, 1974 the Custodian of Notarial Records for the Parish of Orleans filed a rule to show cause directed to all notaries in Orleans Parish to test the surety on each notarial bond, to have all notarial acts deposited in his office, and to collect the annual fee allowed him by law.

In response to this rule to show cause, petitioner, Glenn L. Morgan, a notary for Orleans Parish, filed a peremptory exception of unconstitutionality on the grounds that Louisiana Revised Statutes 35:251 et seq. violate the requirements of the Fourteenth Amendment of the Constitution of the United States in that notaries of Orleans Parish are treated in a different manner from the notaries of other parishes of Louisiana.

The state trial court dismissed the exception of unconstitutionality and an appeal was taken by the petitioner.

A majority of the state court of appeal upheld the constitutionality of the challenged statutes and found that the legislature could have had a rational basis for requiring notaries of Orleans Parish to post a higher bond, to produce evidence of solvency of their sureties, and to pay an annual fee. *In re State ex rel. Wootan*, 313 So.2d 621 (La. App. 4th Cir. 1975). Petitioner's motion for rehearing by the appellate court was denied.

The Supreme Court of Louisiana subsequently refused to grant a writ of certiorari or review and held that the result of the court of appeal was correct.

ARGUMENT

Petitioner contends that certain statutes regulating notaries in Louisiana are violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution because they place three requirements on notaries of Orleans Parish that are not placed on notaries outside of that parish. First, under the provisions of Louisiana Revised Statute 35:327, notaries of Orleans Parish are required to pay a $15 annual fee, unlike the notaries of other parishes who are not required to pay an annual fee. Second, instead of the one thousand dollar bond required by Louisiana Revised Statute 35:191 of most of the notaries outside of Orleans Parish, Orleans notaries are required by Louisiana Revised Statute 35:253 to provide a bond of $10,000. Third, the surety on the Orleans notarial bond is tested annually.

The United States Supreme Court has long recognized that statutory schemes challenged under the equal protection clause of the Fourteenth Amendment are subject to varying standards of review depending on the nature of the statutes involved. Where so-called "fundamental rights" or "suspect classifications" are concerned, the Court has required a standard of strict scrutiny to determine whether a state has a compelling interest in enacting and enforcing the challenged statute.[1]

Following these guidelines, the Court has carefully scrutinized statutory classifications involving such

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1 *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

fundamental rights as the right to vote,[2] the right to interstate travel,[3] the right to freedom of association,[4] and the right to a criminal appeal[5] to determine whether such classifications advance a compelling state interest. Statutory classifications based on race[6] or national origin[7] are formally suspect and must also satisfy a compelling state interest.[8]

In this case, however, Petitioner alleges no fundamental right or suspect classification that would require the Court to examine the Louisiana statutory scheme for notarial bonding and annual fee payments with the kind of searching intensity required in the instances described above. The classification involved, that between notaries of Orleans and other parishes, hardly could be viewed as suspect. Similarly, the "right" if any, to become a notary, is clearly not "fundamental" in any constitutional sense. Petitioner's citation to the case of *Goosby v. Osser*, 409 U.S. 512, (1973), a case alleging interference with voting rights, is therefore clearly inapposite to the facts presented here.[9]

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2 *Dunn v. Blumstein*, 405 U.S. 330 (1972).

3 *Douglas v. California*, 372 U.S. 353 (1963).

4 *Kusper v. Pontikes*, 414 U.S. 51 (1973).

5 *Loving v. Virginia*, 388 U.S. 1 (1967).

6 *Graham v. Richardson*, 403 U.S. 365 (1971).

7 *Id.*

8 Illegitimacy, *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164 (1972), and Sex, *Frontiero v. Richardson*, 411 U.S. 677 (1973), hover on the perimeter of the suspect category and appear to require some level of heightened review.

9 Petitioner apparently recognizes that the challenged statutes are not susceptible of strict scrutiny by the Court. After asking ". . . under what standards these facts fit?" the Petitioner answers: "The Petitioner suggests that there is no rational basis for the distinction." Petition, p. 7.

In those instances where neither fundamental rights nor suspect classifications are involved, the Court has applied a more benign standard of review that inquires only whether a "rational basis" exists between the challenged statute and the probable purposes of the legislation.[10] Presumably, this different standard arises from a recognition of the dual responsibility of the Court to uphold constitutional values while recognizing the legislature's role as a coordinate branch of government. In any event, the Court has, in these situations, accorded the challenged legislation with a presumption of constitutionality.[11] And nowhere is the examination of the Court more relaxed than in those areas involving economic or social regulation of distinctly local matters.

In *McGowan v. Maryland*, 366 U.S. 420 (1961), the Court held that Sunday closing laws in effect in Maryland's Anne Arundel County were not violative of the Fourteenth Amendment. In so holding, the Court set forth the standard of review ordinarily applicable to state economic regulation:

> "The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safe-

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10 *E.g., San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

11 *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969); *see Levy v. Parker*, 346 F.Supp. 897 (1972).

> guard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.* See Kotch v. Board of River Port Pilot Com'rs, 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093; Metropolitan Casualty Ins. Co. of New York v. Brownell, 294 U.S. 580, 55 S.Ct. 538, 79 L.Ed. 1070; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369; Atchison, T. & S.F.R. Co. v. Matthews, 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909."
>
> 366 U.S. 420, 425-26 (emphasis added).

The *McGowan* test, that the constitutionality of any statute should be upheld "if any state of facts reasonably may be conceived to justify it," has frequently been cited as controlling in later decisions of the Court.[12]

For example, in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1968), the Court upheld the constitutionality of an Illinois statute that operated to deprive certain inmates of the right to cast absentee ballots. In so doing, the Court, citing with approval the *McGowan* decision, held that distinctions drawn by a challenged statute would be set aside as

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12 *E.g., Lindsey v. Normet*, 405 U.S. 56, 70 (1972); *Schilb v. Kuebel*, 404 U.S. 357 (1971); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. The Court further noted that legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.[13]

Similarly, in *Dandridge v. Williams*, 397 U.S. 471 (1970), a Maryland regulation placing an absolute limit on the total grant to which a family was entitled under the Federal Aid to Families with Dependent Children program was challenged on equal protection grounds. In holding that the regulation was constitutional, the Court reviewed the degree of judicial scrutiny to be employed in cases involving state regulation of social and economic matters:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsey v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it

13 *McDonald v. Bd. of Election Commr's. of Chicago*, 394 U.S. 802, 809 (1968).

> may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730."
>
> 397 U.S. 471, 485.

In setting out the applicable standards to be applied to review of certain state regulations, the *Dandridge* court further observed: "It is a standard that has consistently been applied to state legislation restricting the availability of employment opportunities."[14] This observation regarding challenges to statutory schemes limiting employment opportunities is reinforced by the case of *Goesaert v. Cleary*, 335 U.S. 464 (1948).

In *Goesaert*, the Court was confronted with a Michigan statute that denied bartending licenses to women except the wives or daughters of male bar owners. In holding that the statute was not violative of the Equal Protection Clause, Justice Frankfurter speculated on the purposes of the challenged statute and recognized that the statute's constitutionality could be maintained where if a possible (even if improbable)[15] purpose of the law could have been to effect social and economic aims.

In another case challenging the constitutionality of a Louisiana statute affecting employment, *Kotch v River Port Pilot Commissioners*, 330 U.S. 552 (1947), the Court upheld the Louisiana legislature's scheme of licensing river pilots even though the system in-

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14 *Dandridge v. Williams*, 397 U.S. 471, 486.

15 See *Developments in the Law — Equal Protection*, 82 Harv.L.Rev. 1065, 1079 (1969).

evitably resulted in nepotic hiring practices. In so holding, the Court noted:

> "We are aware of no decision of this Court holding that the Constitution requires a state governor, or subordinates responsible to him and removable by him for cause, to select state public servants by competitive tests or by any other particular method of selection. The object of the entire pilotage law, as we have pointed out, is to secure for the State and others interested the safest and most efficiently operated pilotage system practicable. We cannot say that the method adopted in Louisiana for the selection of pilots is unrelated to this objective."
>
> 330 U.S. 552, 563-65.[16]

As was noted above, the courts have afforded state statutes of the type challenged here a presumption of constitutionality. Far from rebutting that presumption, petitioner failed to introduce evidence of any type in the trial court,[17] let alone evidence that would support a finding of unconstitutionality. Instead, Petitioner apparently relies primarily on the cases of *Hopkins v. Southern California Telephone Company*, 275 U.S. 393 (1928) and *Levy v. Parker*, 346 F.Supp. 897 (E.D.La. 1972) for authority that the Louisiana notarial scheme is unconstitutional. In *Hopkins*, the Court held that persons within the same class were con-

16 In a similar vein, the Court recently affirmed the right of a state to require that political activities on the part of state employees be restricted. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

17 313 So.2d 621, 622 (1975).

stitutionally protected against unequal tax treatment. In the instant case, however, it is readily admitted that notaries of Orleans Parish are in a *different* statutory class than notaries of other parishes. The important question is whether the different classifications are constitutionally permissible under the Fourteenth Amendment. Petitioner's reference to *Levy v. Parker* is similarly inappropriate. In *Levy*, a system of tax distribution created solely for the purpose of reimbursing each parish for lost revenues was found to be inherently incapable of fulfilling that function and patently "arbitrary,"[18] establishing "a rule for distributing state funds that is no rule at all."[19] Unlike the plaintiff in *Levy*, Petitioner has failed to show that the statutory scheme challenged here does not operate on "any basis that might constitute coherent governmental policy."[20] Furthermore, a review of the possible reasons the Louisiana legislature adopted the notarial system reveals numerous arguments showing the possible benefit and rationality of the notarial laws of Louisiana.

As a preliminary matter, the special role of the Louisiana notary should be noted. Louisiana's notarial system is the product of three distinct legal heritages: French, Spanish, and North American. The result is what is generally regarded as the most unique notarial system in the United States. The Louisiana notary, for instance, is separated from his counterpart in other states by two distinguishing characteristics: he is commissioned for life, subject to good

18 *Levy v. Parker*, 346 F.Supp. 897, 903 (E.D. La. 1972).

19 *Id.*

20 *Id.* at 904.

behavior, and he is usually an attorney.[21] While he may not be licensed to practice law, the Louisiana notary nevertheless has complete authority to confect legal documents, provided he has passed the stringent notarial examination given twice a year for those who are not already attorneys.[22]

Consequently, the Notary Public in Louisiana is a highly respected professional by virtue of his awesome legal responsibility. Because the grave responsibilities shared by Louisiana notaries generally are heightened in the case of the Orleans notary for reasons discussed below, the state legislature, through the statutes challenged in this case, has set special requirements for the notary practicing in Orleans Parish.

The requirements of La. R.S. 35:253 and La. R.S. 35:328 that Orleans notaries provide a bond with one or more solvent sureties in the sum of $10,000, while bonds of only $1,000 are required in all of the other parishes except Caddo Parish, and that sureties for Orleans notaries be tested yearly are supportable for several reasons. First, the population of Orleans Parish is both greater and more dense than the population of any other parish. Since it is likely that more people will require the services of notaries in Orleans Parish than in any other parish, it is reasonable for the legislature to require a higher bond in Orleans Parish. Similarly, a higher bond is justified on the basis that notaries, who incur statutory responsibility in connection with the conveyance of real estate in Loui-

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21 *See* La. R.S. 35:1 *et seq.* (1950).
22 *Id.*

siana, would be dealing with properties of a greater total value in Orleans Parish. Viewed in this context, it hardly seems irrational to require that a notary who is potentially responsible for dealing with valuable real estate on a frequent basis could be required to provide a bond of $10,000. The Louisiana legislature, mindful of the Orleans notary's special role, recognized that a $1,000 bond was insufficient to provide meaningful protection to persons damaged by the notary's negligence. For the same reasons, an annual testing of the notary's surety on the bond is justified.

The Louisiana appellate court was mindful of the special role of population and density in Orleans Parish in its opinion upholding the constitutionality of the system.

> "But despite these considerations we can still conceive of reasonable facts which the legislature might have considered in establishing the distinction. For instance, R.S. 35:2 lists a number of powers granted to notaries, some of which are perhaps even more serious than those which affect real estate, and the power of the notary to function is limited to the Parish where he is commissioned, R.S. 35:2 and 10. Even the power of a notary to administer oaths and take acknowledgments is limited to the parish where he is commissioned. Op.Atty.Gen. 1934-36, p. 818 and 1920-22, p. 899. Perhaps the legislature believes that the density of the population in Orleans Parish is still such that the potential of the Orleans notary to

> exercise his official functions is still greater than that of the notary commissioned outside of Orleans Parish and that these conditions operate to justify greater protection to the public in the form of a higher bond for Orleans notaries than elsewhere. Perhaps the legislature believes that this higher potential for functioning requires a closer method of checking on Orleans notaries with the attendant annual fee and the regular reporting system provided by the statutes."
>
> 313 So.2d 621, 624.

Petitioner also contends that Louisiana R.S. 35:327, which requires a $15 annual fee, is in violation of the Fourteenth Amendment because an identical fee is not charged to notaries in other parishes. This argument overlooks the unique nature of the method of storing notarial records in Orleans Parish. In parishes outside of Orleans, official acts of notaries are normally stored in facilities maintained by the Clerk of Court for each parish. The costs of maintaining the necessary storage facilities and personnel are borne by the office of the Clerk of Court of the parish and are payable out of revenues he receives in connection with other functions performed by his office.[23] However, in Orleans Parish a special office for the storing and indexing of notarial records has been created by statute.[17] This statute requires that a special custodian maintain original notarial records of notaries of Orleans Parish. Unlike the expenses incurred by the cus-

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23 *See In re State ex rel. Wootan*, 313 So.2d 621, 624 (La. App. 4th Cir. 1975).

24 La. R.S. 35:323 (1950).

todians of notarial acts in many other parishes, the expenses of the custodian in Orleans Parish are not paid out of operating funds from the Clerk of Court of the parish. Instead, his operating funds come from two principal sources: a $3.00 filing fee for each recordation[25] and the yearly $15.00 fee charged to all Orleans notaries.[26] Additionally, it is not true, as petitioner has implied, that the recordation costs of parishes other than Orleans are uniform. In point of fact, each parish charges varying fees for the cost of recording notarial acts. These variances can readily be explained in terms of varying costs associated with maintaining facilities and personnel needed in each parish. Thus, there is ample indication that a rational basis exists for the additional filing fee required of notaries in Orleans Parish.

CONCLUSION

The standard of review applicable to state statutory schemes that impinge on fundamental rights or promote classifications that are inherently suspect is inapposite in this case. Instead, a relaxed standard that inquires into the possible reasonableness of the statutory scheme is appropriate. Applying that standard to Louisiana's requirements for notarial practice in Orleans Parish mandates a finding that the requirement of a higher bond that is tested regularly and the payment of an annual fee is not violative of the Equal Protection Clause of the Fourteenth Amendment. Therefore, the petition of Glenn L. Morgan for writ of certiorari should be denied.

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25 La. R.S. 35:323 (1950).

26 La. R.S. 35:327 (1950).

Respectfully submitted,

Phillip A. Wittmann

Walter B. Stuart IV
Of
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON
1000 Whitney Bank Bldg.
New Orleans, La. 70130
Telephone: (504) 581-3200

Ronald P. Whittington
Of
WOOTAN, HOWCOTT
& WHITTINGTON
1649 First National Bank
of Commerce Bldg.
New Orleans, Louisiana 70112
Telephone: (504) 586-1996

Attorneys for Respondent,
Guy Wootan, Custodian of
Notarial Records

William J. Guste, Jr.
Attorney General
State of Louisiana

Warren E. Mouledoux
First Assistant Attorney General

Robert E. Redmann
Assistant Attorney General
State of Louisiana
7th Floor, 234 Loyola Avenue
New Orleans, Louisiana 70112
Telephone: (504) 527-8371

Attorneys for the
State of Louisiana

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Louisiana have been mailed, postage prepaid, to the Petitioner, Glenn L. Morgan, P. O. Drawer 51478, New Orleans, Louisiana 70151, this ____ day of January, 1976.

Phillip A. Wittmann